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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.....

W. M. OLLIFF,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

W. M. Olliff prays that a writ of certiorari issue to the Court of Criminal Appeals of Texas to review the judgment of said Court entered in the above-entitled cause on the 9th day of June, 1954.

Citation to Opinions Below

The opinion of the District Court where the case was tried is not reported; it is expressed in the Court's correction of Defendant's Bill of Exception Number I, and is printed as Appendix A, hereto, and in the record at pages 60-64, inclusive. The opinion of the Court of Criminal Appeals of Texas has not yet been reported by the official reporters, but it is printed and attached hereto as Appendix B, and appears at page 405 of the record. The opinion of the Court of Criminal of Appeals of Texas denying petitioner's First Motion for a Rehearing appears at page 427 of the record, and is printed and attached hereto as Appendix C.

Jurisdiction.

The judgment of the Court of Criminal Appeals of Texas, the highest court of the State of Texas in which a decision could be had in this case, was entered on the 9th day of June, 1954. Petitioner's First Motion for a Re-hearing was denied on October 20th, 1954, and his Second Motion denied and the judgment of the Court of Criminal Appeals of Texas made final on the 17th day of November, 1954.

At the time the judgment of the Court of Criminal Appeals of Texas was made final, November 17th, 1954, the Court entered an order Staying the issuance of a mandate against the Appellant, this Petitioner, for a period of ninety days from the date of said order tht Appellant might petition the Supreme Court of the United States for a writ of cerioarari, and said order further provided that if a writ of certiorari should be granted in this case then in that event the issuance of the mandate against this petitioner should be stayed until such time as the Supreme Court of the United States acted upon the case.

The judgment of this Court is invoked under Articles I, IV and XIV of the Amendments to the Constitution of the United States.

The Federal question sought to be ~~revised~~ reviewed was raised in the District Court of Midland County, Texas, 70th Judicial District, the trial court, by this

petitioners, then the defendant's motion to the court to instruct the State's Attorneys not to make inquiry of the veniremen about their connection with a religious socviety known as Jehovah's Witnesses. (Appendix A.)

The defendant's motion was overruled by the court and the State's attorneys permitted to ask each and every venireman examined whether or not he was or had ever been a member of the sect known as Jehovah's Witnesses, and, whether or not, to his knowledge, any member of this family or close friends were Jehovah's Witnesses. (Appendix A.)

These questions were asked all veniremen over the objection of counsel for the defendant who held and claimed that they were in violation of Articles I, VI and XIV of the Amendments to the Constitution of the United States.

Question Presented

Whether or not the State's attorneys in the trial of a criminal case had the lawful right in the course of their voir dire examination of veniremen in the selection of a jury, to ask each and every veniremen if he had every been a member of the society of Jehovah's Witnesses, and whether or not any member

of his family or close friends were or had ever been members of such Society.

Constitutional Provisions Involved.

The Constitutional Provisions involved in this case are Article I of the Amendments to the Constitution of the United States which reads as follows:

> "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances."

Article VI of the Amendments to the Constitution of the United States, which reads as follows:

> "In all criminal prosecuions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Article XIV, Section 1, of the Amendments to the Constitution of the United States, which reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement Of The Case.

In this case the defendant, W. M. Olliff, Petitioner here, was indicted for murder with malice and his case called for trial in the District Court of Midland Countyt, Texas, 70th Judicial District, on November 30, 1953.

Mr. Olliff was a member of the religious society known as Jehovah's Witnesses. Fearing and firmly believing that reference to his religious belief would be prejudical to him he sought to be tried, and his counsel sought to have him tried, without reference

to his religion. For this purpose, before announcing ready for trial, and in open court, counsel for the defendant presented to the court a motion requesting the court to instruct the State's attorneys not to make any inquiry of the veniremen concerning their membership in, or connection with, the religious group known as Jehovah's Witnesses, counsel contending that the court should judicially know this sects convitions and attitude toward military service, and the Selective Service Law during the late World War had brought it into disrepute and aroused widespread feeling against it, and that linking the defendant with such organization would result in hurtful prejudice against him. (Defendants Bill of Exceptions Number I. Appendix A hereto.)

The State's attorneys objected to such motion and instructions and the court overruled it.

Counsel for the defendant, Petitioner here, took their exception to the ruling of the court and preserved it as their Bill of Exceptions Number 1. Appendix A.

Upon the interrogation of veniremen for the purpose of selecting the jury the State's attorneys asked each and every prospective juror as follows:

"Q. Mr. Martin, I ask have you been a member of the Jehovah's Witnesses at any time in your life?"

"A. No."

"Q. Mr. Martin, I would like to ask you to your knowledge if any member of your family and particularly any close friends are members of the Jehovah's Witnesses or its religious group?"

"A. No."

The jury was selected with these questions, or questions of the same import, having been asked every prospective juror over the objections of counsel for defendant, who all along contended they were a reference to defendant's religion, highly prejudical to his rights, and in violation of Articles I, VI and XIV of the Constitution of the United States.

The defendant was tried before such jury, found guilty as charged and sentenced to fifteen years in the penitentiary.

A motion for a new trial was filed and overruled by the court and the defendant gave his notice of appeal to the Court of Criminal Appeals of Texas.

After notice of appeal was given the defendant discovered another eye witness to the shooting upon which the charge of murder was based, took an affidavit to what he said he had seen and filed it in the case. With leave of the court had, the defendant withdrew his notice of appeal and filed an amended motion for a new trial, alleging the newly discovered

evidence, as provided by the Statutes of the State of Texas. In support of his amended motion for a new trial the defendant presented this witness in open court where he testified at length upon examination and cross examination. After hearing him the court again denied defendant's motion for a new trial; defendant excepted to the court's ruling and gave notice of appeal to the Court of Criminal Appeals of Texas.

The appeal was perfected on April 23, 1954, and on June 9, 1954, the Court of Criminal Appeals affirmed the judgment of the trial court, rendering the judgment attached hereto as Appendix B.

Appellant's First Motion for a Re-hearing was denied on October 20, 1954, and the Court of Criminal Appeals delivered the opinion attached hereto as Appendix C.

Appellant's Second Motion for a Rehearing was denied by the Court without further opinion on November 17, 1954, and its decision made final. But the Court, on this date, stayed the issuance of mandate for a period of ninety days from date to give appellant time to file his petition for a writ of certiorari in the Supreme Court of the United States, and provided further that if such writ should be granted then issuance of the mandate should be stayed until the Supreme Court should act on the case. (Appendix D.)

Reasons For Granting The Writ.

The question submitted here is one of vital importance to every man, woman, and child in the United States of America and will be as long as our form of government endures. We do not believe that it has been settled by the highest authority of the land, and that it should be.

It was raised at the very beginning of the trial of the subject case, the State of Texas V. W. M. Olliff, in the District Court of Midland County, Texas, the trial court, by the defendant's moving the court to instruct the State's attorneys not to inquire of the veniremen concerning their connection, if any, with the religious society of Jehovah's Witnesses for the reason that defendant feared such questioning would result in prejudice against him.

We hold that the line of questioning undertaken by the State's attorneys, and explained in the Statement of the Case herein, in selecting the jury to try the case, which was upheld by the trial court and the Court of Criminal Appeals of Texas, was in violation of Article I of the Amendments to the Constitution of the United States.

This Article reads:

> "Congress shall make no law respecting an estaablishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances."

Congress can make no law respecting an establishment of religion or prohibiting the free exercise thereof. Of course this petitioner is not complaining of anything Congress has done, or that the State Legislature has done, but he and his counsel contend that the questioning of the venire objected to was in plain violation of this provision of the Constitution of the United States.

Can it be held that when the framers of this Bill of Rights forbade Congress to make any law respecting an establishment of religion or prohibiting the free exercise thereof, they intended that the courts could interpret what they said in such a way as to constitute a restriction upon the free exercise of their religion? We emphatically think not.

Jehovah's Witnesses are a religious sect, religious organization, an establishment of religion. Congress can make no law respecting them. Then can the courts? If this Court upholds the courts below then it beomes a part of the supreme law of the land that

attorneys can always question jury panels and venires as to whether or not they are Jehovah's Witnesses or have Jehovah's Witnesses' sympathies for the purpose of excluding them from jury service if they want to.

In that event, if the matter stopped there, we would have created a special, discrimnatory law respecting an establishment of religion, Jehovah's Witnesses.

But it would not stop at that. Someone else, some other attorney would decide it would be to his best interest, or to his clients best interest, to exclude some other religious sect, religious faith, organiations or establishment from his jury, and would want to question the panel or venire regarding their belief in, or membership in such sect, faith, organiation or establishment for that purpose. Then, based upon the Olliff case, what could a court do but permit him to do so? We can't says Baptists, Methodists, Presbyterians, Catholics, Seventh Day Adventists, the Jewish Church and somebody else are establishments of religion, but Jehovah's Witnesses are not; nor vice veresa. All are establishments of religion. All are the same and must remain the same under the law. If a jury panel may be examined as to belief or membership in one it must necessarily be lawful to examine its members as to their beliefs in, or membership in any other establishment the attorney might desire.

When this is so the bars are down for wrangling

over religious questions in the selection of juries. They are down for attempting to select, and selecting partial and prejudiced juries along religious lines in violation of Article VI of the Amendments to the Constitution of the United States.

The whole idea is repungent to the spirit and high purpose of our fundamental law and should be destroyed in this case.

If it is persisted in, and allowed to grow, as it will if it is allowed to live, it will in time certainly put a stricture upon the exercise of religion. Men will hesitate to practice, or exercise their religious faith for fear that some time it might be held against them in he courts of the land if they should ever have to go there. Strictured exercise of religion is not free exercise of religion, as guaranteed by Article I of the Amendments to the Constitution.

If the holding of the trial court and the Court of Criminal Appeals of Texas is the law a Jehovah's Witness could hardly ever hope to have a man of his own faith on a jury that might be trying him, whether for his property, his liberty or his life. To deliberately and systematically deprive a person of a jury leavened by a member of his own faith, his own race, his own color or his own creed is to deny him the equal protection of the law as was meant to be secured to all

by Article XIV, Section 1, of the Amendments to the Constitution. Becauses, as far as we know, all, have until this time, had the hope that when their property, their libery or their life was placed in the hands of a jury they might have a kindred soul thereon.

We find little authority to support us in our position in this case except the wording of the Constitution itself. We have no cases exactly in point; we do not believe the question has been determined. In American Jurisprudence, Constitutional Law, Volume 11, Page 1102, the text reads:

> "In order to violate the Constitutional right to religious freedom a statute must work an establishment of religion, provide for compulsory support, taxation or otherwise, of religious institutions, make attendance upon religious worship compulsory, work a restriction upon the exercise of religion according to the dictates of conscience or impose restrictions upon the exercise of religious belief," citing in support of this text State ex rel. Temple V. Barnes, 22 N. D, 18, 132 N, W, 215, 37 L, R, A, (N, S.) 114, Ann. Cas. 1913E 930.

Referring to the clause above pertaining to the working of a restriction upon the exercise of religion according to the dictates of one's conscience, what more vicious restriction could be worked against any

religious group than restricting its members from serving on juries where another member is being tried, and prohibiting the member being tried from ever having a person of his faith on his jury, even though such restriction and prohibition is accomplished under the ruse of 'intelligently exercising one's preemptory challenges', as has been argued by the State's attorneys in this case?

In this case we do not believe that it was necessary for petitioner to prove that prejudice actually resulted against him by directing the jury's attention to the fact that he was or had been, a Jehovah's Witness, as complained of. We believe, and contend that the questions concerning their connection with, or membership in the religious establishment of Jehovah's Witnesses, if any, asked the veniremen in this case were unlawful, fundamentally wrong and unconstitutional; that the jury thus selected, over the objection of petitioner, was unlawfully and unconstitutionally selected, and that therefore this petitioner now stands deprived of fifteen years of his liberty without due and proper process of law, contrary to the guarantee intended in Article XIV, Section 1, of the Amendments to the Constitution.

However, we do believe and contend that prejudice resulted and that the record so reflects; we contend that this man, who earnestly pleaded self defense,

and was convicted upon the testimony of a woman with a 'drug problem' (Testimony of Dr. Martin Boone, Page 268, of the record) was convicted by something other than evidence.

We are familiar with the holding of the Court in United States Vs. Jones, 162 Federal Reports, 2nd Series, 72. This is a Circuit Court of Appeals Case, Second Circuit, May 29, 1947.

In it this question was raised an answered, but wo do not thing it finally determines the law. First, we do not think so because it is not a Supreme Court decision. And second, we do not think so because the language of the Court clearly indicates to us, that if the circumstances had been different the holding of the Court might have been different.

The Court said:

> "In the circumstances, we do not think it was error for the trial judge to ask the jurors, before any evidence was received, whether any of them were Jehovah's Witnesses."

In the case the defendant was being prosecuted for violating the Selective Service Act in failing to report for work of national importance at a civilian public service camp pursuant to a order of the local draft board.

It is well known that the religious sect of Jehovah's Witnesses was, and is, opposed to many provisions of the Selective Service Act, and particularly to that part

which requires them to bear arms in combat for the purpose of killing other human beings.

Any juror, in that case, if he were a Jehovah's Witness, would have believed as a part of his religious conviction just as the defendant did and would have been disqualified, subject to challenge for cause by the Government. It was a case where the jurors religious belief might have been in conflict with the law, if he were a Jehovah's Witness.

In our case the reverse is true. The defendant, Mr. Olliff, Petitioner here, was beineg tried under the State law for murder. No one, no religious sect, is more opposed to the taking of life than are Jehovah's Witnesses. In fact, the creed of the sect is to renounce even the righ of self-defense. If there had been a Jehovah's Witness on the venire from which Petitioner's jury was selected, and he had been asked if he believed in the right of self defense, if he believed a man had the right to protect himself from death or serious bodily harm, even to the extent of taking another life, and if he could accord that right to the defendant, as all the veniremen certainly were asked by Petitioner's counsel, he undoubtably would have replied in the negative. And in that event the venireman would have been challenged for cause by the defendant.

The circumstances in our case are so different from

the circumstances in the Jones case that we believe the decision in the Jones case does not fix the law on the question we are presenting.

The question should be settled by this Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

January 22, 1955

Respectfully Submitted

Pat M. Baskin

Merritt F. Hines,
Counsel for Petitioner.

Appendix A.

In The District Court of Midland County, Texas,

November Term, A. D. 1953.

THE STATE OF TEXAS, PLAINTIFF,

VS.

W. M. OLLIFF, DEFENDANT

NO. 1878

BILL OF EXCEPTION NUMBER 1

BE IT REMEMBERED THAT, upon the trial of the above entitled and numbered cause, the defendant, in open court before any announcement was made, presented the Court a motion to instruct the district attorney not to make inquiry from the jurors about their connection with a religious society known as the Jehovah Witness, and the Court, having heard the same, overruled such motion and the Court permitted the district attorney, over the objection of the defendant, to interrogate the prospective jurors on voir dire examination as to whether or not such jurors, any member of his immediate family or any specificially

or particularly close friend was a member of the Jehovah Witness religious group. To this action of the District Attorney the defendant objected and excepted on the grounds that it was a violation of the constitutional rights of the defendant pursuant to Amendments 1 and 14 of the Constitution of the United States and under Section 4, 5 and 6, Article I of the Texas Constitution, in that it was an encroachment on the religious liberty of the defendant: and thereaftere, towit, on the 19th day of of April, A. D. 1954, the defendants counsel presented to me for my approval and signature the following Bill of Exceptions, towit:

BILL OF EXCEPTION NUMBER I

"BE it remembered that on the—— day of December 1953, the above entitled and numbered cause was called for trial, and the defendant, W. M. Olliff, in open Court, before any announcement was made, presented and read to the Court a motion to instruct the District Attorney not to make any inquiry from the jurors about their connections with a religious society known as Jehovah's Witnesses, for the reason that the defendant was a member of the religious sect and the Court judicially knows that during the war

their refusal to serve in the army brought the organization into disrepute and any reference to said organiation would create a prejudice against the defendant which should not have been done on account of his right to enjoy his own personal and religious liberty.

"The Court overruled this motion and permitted the State over the defendant's objections to interrogate each and every juror as follows:

"Q. Mr. Martin, ask you if you have been a member of the Jehovah Witnesses at any time in your life?

"A. No.

"Q. Mr. Martin, I would like to ask you to your knowledge, if any member of your family and particularly any close friends are members of the Jehovah Witnesses or its religious group?

"To which action of the District Attorney, the defendant objected and excepted to that question or any answer the juror might make for the reason that under he Constitution of this country, the United States of America, Amendments 1 and 14, and the State of Texas, Sections 4, 5 and 6, Article 1, Texas Constitution, religious liberty is guaranteed and under no circumstances shall a man's religious convictions have anything to do with his right to a trial in a Court of Justice in this country.

"The Court then and there overruled the defendant's objections and permitted the juror to answer. The District Attorney knew that the juror was not a member of the Jehovah Witnesses. He knew the defendant had been a preacher in the Jehovah Witnesses and was doing it solely for the purpose of prejudicing the juror against the defendant. The said conduct on the part of the District Attorney was prejudicial and inflamatory and done soley for the purpose of prejudicing the jury against the defendant on account of his religion.

"To save time, it was stipulated by the State and the defendant and expressly approved by the Court that the same question would be asked and the same objections urged to every member of the special venire as they were called and examined and the same was done. That the defendant made nine pre-emptory challenges and could not have made the other twelve that were taken on the jury.

"

"Attorney for the Defendant

"APPROVED

"

_____

"District Attorney

"The foregoing bill of exception No. 1 has been reduced to writing by counsel for defendant, and having been presented to the undersigned presiding Judge of said Court for allowance and signature within the time prescribed by law, and having been by me submitted to counsel for the State of Texas and found by him to be correct, and having been by me found to be correct, is herebey allowed, approved and ordered filed by the Clerk of this Court as a part of the record in such cause, this——— day of April, 1954.

"

_____

District Judge"

And having examined the same, I presented same to the District Attorney, who returned the same to me with the following objections thereto, towit:

1. That he did not believe that the Court judicially knew that during the war the refusal of the Jehovah

Witnesses to serve in the army brought the organization into disrepute and any reference to such organization would create a prejudice against the defendant which should not have been on account of his right to enjoy his personal and religious liberty.

2. That the District Attorney did not know that any one of the jurors was not a member of the Jehovah Witnesses.

3. That the District Attorney, in fact, did not know the defendant had been a preacher in the Jehovah Witnesses.

4. That the District Attorney was not making that inquiry solely for the purpose of prejudicing such jurors against the defendant.

5. That said conduct on the part of the district attorney was not necessarily prejudicial and inflammatory.

6. And was not done for the purpose of prejudicing the jury against the defendant on account of his religion.

7. That the defendant did not make nine but rather made six preemptory challenges.

And I found the said Bill of Exception to be incorrect in the following particulars, towit:

1. In that I do not and did not have judicial knowledge of the fact that during the war the Jehovah Witnesses' refusal to serve in the army brought the organization into disrepute, and any reference to such organiation would create a prejudice against the defendant which should not have been done because of his right to enjoy his own personal and religious freedom.

2. In that I do not find the District Attorney knew that each or any of the jurors was not a member of the Jehovah Witnesses.

3. In that I do not find the District Attorney knew that the defendant had been a preacher in the Jehovah Witnesses Church.

4. In that I do not find that the inquires of the jurors complained of by defendant were made by the district attorney for the purpose of prejudicing the jurors against the defendant.

5. I do not find the conduct on the part of the District Attorney was prejudicial and inflammatory and done for the purpose of prejudicing the jurors against the defendant on account of his religion.

6. I do not find the defendant made nine pre-emptory

challenges, but rather find the defendant made six pre-emptory challenges in selecting the jurors in the trial of this cause.

And I called the attention of defendant's counsel thereto and he declined to agree to the necessary corrctions, whereupon I refused to sign said bill of exceptions and endorsed thereon by refusal and returned the same to him, and I sign this bill of exception as a full and correct presentation of the ruling of the court, excepted to as it actually occurred, and order the same to be filed as a part of the record in this cause, on this 19th day of April, 1954.

Wm. B. Deaderick
District Judge

Appendix B.

W. M. OLLIFF, Appellant)

No. 27,011) Appeal from Midland County

THE STATE OF TEXAS,)

Appellee)

OPINION

The conviction is for murder, the punishment fifteen years in the penitentiary.

Appellant, a 52 year old operator of a trailer camp in Midland, admittedly shot with a pistol and killed R. W. Alexander.

The deceased Alexander had, prior to the day of the killing, rented space for his trailer house at appellant's camp and some unpleasantness had arisen because of a mud fight between their sons. This resulted in appellant suggesting that the deceased move, which he did the morning of the day he was killed.

The deceased left owing appellant $12.00 rent, and appellant went to the trailer camp to which the deceased had moved for the purpose of collecting such rent. He did not find him there, but later saw the deceased and his wife as they were about to enter a small house that proved to be the residence of friends of the deceased and his wife.

According to appellant's version the deceased entered the residence, then came out "at a pretty fast clip". This scared appellant and caused him to believe that the deceased was going to attack him, so he called out, "Mr. Alexander you forgot to pay me when you left up there."

The deceased replied that he did not forget to pay, cursed and ran up and grabbed appellant's arm as he stood near the front of his car.

He jerked loose and attempted to get in his car but the deceased pulled him out. Appellant succeeded, however, in getting a pistol from the front seat of the car and pointed at the deceased's heart. He explained that he was attempting to bluff him, and said, "Mr. Alexander, I just came down here to collect my rent" and when the deceased said nothing he added, "I got a gun here; I got a gun here."

The deceased then caught his hand and shoved the gun down. Appellant testified that he pulled the trigger when he was sure in his own mind the pistol was not pointed at the deceased; that he had no intent to hit him, but only to bluff or scare him.

According to appellant, the deceased at the time of the shot gave his arm a twist, thus accounting for the bullet striking the deceased.

Appellant further testified that he was not aware

of the pistol being on the seat of the car when he was looking for and located the deceased, but first discovered it there as he was being pulled out of the car by the deceased.

The state, after appellant had testified, produced an eye witness to the killing who gave an entirely different version thereof.

Louise Jones testified that she was standing at a window of the house which she then occupied diagonally across the street from where the shooting occurred. She testified that she saw appellant's car drive up; saw him getting out of the car with a six shooter behind his legs; saw the deceased walking from the house, and just as he walked around the open door of appellant's car "Mr. Olliff raised his six shooter and pointed it just above his belt - - - and the boy threw his hand, both hands, straight up and just said 'Oh!' and broke and ran down the west wall of the house."

This witness further testified that she heard no loud noise, talking or hollering before the deceased said 'Oh!"; that there was no struggle and the deceased did not have his hands on appellant at the time of the shooting.

It is conceded that the issues were properly submitted to the jury and that the evidence sustains their

findings against appellant's claim of accident and self-defense.

There are two principal claims of error presented by formal bills of exception 1 and 2.

Bill No. 1 complains that over appellant's timely objection and after he had filed a written motion seeking to prevent the interrogation, the district attorney was permitted to ask members of the jury panel whether or not they or any member of their immediate family, or any close friends were members of the religious society known as Jehovah's Witnesses.

The bill of exception as presented for approval was refused, and the trial court filed his own bill. He declined to take judicial notice that the refusal of Jehovah's Witnesses to serve in the Army during the war brought the organization into such disrepute that any reference to the organization would create a prejudice against appellant.

Also the trial court declined to certify that the district attorney knew that no member of the jury panel was a member of Jehovah's Witnesses, or knew that appellant had "been a preacher" in such society.

There is nothing in the bill of exception nor elsewhere in the record to show that appellant was a member of or in any way connected with the religious group known as "Jehovah's Witnesses." It is not

shown that members of that organization refused to serve in the Armed Forces during World War II or that any prejudice against the organization existed which was known to members of the jury panel.

We are unable to agree that the conduct of the members of the organization known as Jehovah's Witnesses, in regard to serving in the Army, is so well known and of such a nature as to authorize the courts to take judicial notice of any prejudicial effect of the mention of the organization during the trial of a criminal case.

But if there be such a prejudice against the organization for the reason suggested, or for other reasons, we cannot agree that error is shown by this bill in the absence of a showing that appellant was in some way connected with the organization.

The state, for the purpose of exercising their peremptory challenges, was entitled to have the information sought from the prospective jurors, and we are not impressed with the suggestion that the inquiry should have been limited to the question "of what church are you a member?"

Bill No. 2 relates to the overruling of appellant's amended motion for new trial based upon the claim of newly discovered evidence.

The newly discovered witness Roscoe Conklin testi-

fied on the hearing of the motion to the effect that he passed appellant's car just before the shooting and saw two men at the side of the car who were apparently arguing; that the trailer man, who he identified as appellant, got in or attempted to get in the car and the other pulled him back, that he heard a shot as he was walking away and then saw a man going toward the house.

The witness Conklin was cross-examined at length and admitted that he had been sentenced to the penitentiary for robbery with firearms and for "whiskey" in 1935; and that he had been in trouble since, and was unemployed.

After the hearing had progressed for some time, the district attorney requested a postponement for the purpose of checking into the testimony of Conklin, stating that it came as a surprise; that he did not believe what Conklin had testified and expected to be able to prove that the witness was not in Midland on the day in question.

The hearing was posponed from December 29, 1953, until January 2, 1954, and when court reconvened and Conklin was called for further cross-examination it was ascertained he was not in attendance, and efforts to locate him were to no avail.

The hearing was again postponed and on January

23, 1954, the witness Conklin not having been found, it was stiuplated that after the first hearing had been recessed, appellant's counsel advised the witness he was no longer needed and that during the intervening weeks an intensive search had been made for the witness by attorneys for appellant, attorneys for the state and by both State and County peace officers of West Texas, and no trace of or evidence as to the whereabouts of the witness Conklin had been uncovered or developed.

The trial court, in overruling appellant's motion for new trial, expressed the opinion that the testimony was not probably true.

Appellate challenges the right of the judge to pass upon the truth of the testimony and contends that the question is one for the jury on another trial.

The rule appears to be that the probable truth of newly discovered testimony relied on as ground for new trial, and the question whether its introduction would have affected and probably changed the jury's verdict, are for the court. Hughes v. State, 124 S.W. 2d 349; Henson v. State, 200 S.W. 2d 1007, Branch's Ann. P.C., p. 128, Sec. 200.

But we need not predicate our decision on the trial court's finding that the testimony was not probably true and would not likely have changed the verdict,

because of the insufficiency of the motion to raise the question of newly discovered evidence.

The action of the trial court complained of was the overruling of appellant's second motion for new trial filed on January 23, 1954. It was overruled the same day.

This motion alleges newly discovered evidence and relates that the affidavit of Roscoe Conklin is attached.

The second amended motion for new trial is not sworn to by appellant or his counsel and was therefore insufficient. Branch's Ann. P.C., 125, Sec. 193; Hughes v. State, 293 S.W. 575; Linney v. State, 216 S.W. 2d 209; Fluellen v. State, 194 S.W. 2d 556.

Nor do we find an affidavit attached to such second amended motion made by the newly discovered witness.

If it was so attached, it has been held that the motion must, nevertheless, be verified by the defendant or his counsel. Parroccini v. State, 234 S.W. 671; Cartwright v. State, 225 S.W. 2d 878.

If we may assume that it was intended that the affidavit of Conklin attached to the first amended moion for new trial be considered as a part of the second amended motion, this will not avail appellant for the additional reason that it appears that this

affidavit was sworn to before one of appellant's attorneys.

The defendant's attorney cannot act as a notary public in taking affidavits in support of a motion for new trial for newly discovered evidence. Branch's Ann. P.C. 125, Sec. 194; Cuellar v. State, 154 S.W. 228; Scott v. State, 143 S.W. 610; Peters v. State, 155 S.W. 212; McGinsey v. State, 144 S.W. 268; Maples v. State, 131 S.W. 567; Steele v. State, 223 S.W. 473.

For the reasons stated, the trial court is not shown to have abused his discretion in overruling the motion for new trial.

The judgement is affirmed.

Woodley, Judge.

(Delivered June 9, 1954.)

Appendix C.

W. M. Olliff, Appellant

No. 27,011, v. —Appeal from Midland County

The State of Texas Appellee

OPINION

ON APPELLANT'S MOTION FOR REHEARING

In addition to what we said in our original opinion in disposing of appellant's contention that the action of state's counsel in interrogating the prospective jurors as to membership in the religious sect known as Jehovah's Witnesses constituted a violation of his constitutional guarantee of religious freedom, the following is noted:

While the First Amendment to the Federal Constitution guaranteeing religious freedom operates only as an inhibition to Congress and not to the state, the weight of authority now appears to be that religious freedom, as there guaranteed, is binding upon the states as coming within the due process clause of the Fourteenth Amendment. Meyer v. Nebraska 262 U.S. 390, 67 L. Ed. 1042, 43 S. 625, 29 A. L. R. 1946.

So then, the federal question presented is not so much one of a denial of religious freedom as it is whether appellant has been denied due process of law because of his religious affiliation. The state question presented is whether appellant has been denied religious freedom as guaranteed by Art. 1, Sec. 6, of the the dictates of his own conscience, without prohibition or interference by Congress or the legislatures of the Constitution of this State.

The religious freedom guaranteed in the constitutional provisions rested in and was aimed at security to every citizen in the right to worship according to respective states.

It is the act of these legislative bodies that does or does not violate the guarantee of religious freedom.

Here, we have no legislative act by or through which it may be said that appellant has been denied religious freedom. Consequently, a violation of the constiutional guarantees of religious freedom is not shown by this record.

In its final analysis, then, appellant's contention is that he was discriminated against upon and during the trial of this case because of his religious belief and that his resultant conviction violated due process.

The claimed discrimination arose during the selection of the jury.

There is an absence of any evidence showing or tending to show that the jury, or any member thereof, that tried this case was prejudiced against the appellant because of his religious affiliation. Appellant would have us hold, as a matter of law, that the voir dire examination of the jurors had the effect of informing the jury that he was a member of Jehovah's Witnesses and the knowledge on the part of the jurors of his alleged membership in such religious group so prejudiced them as to preclude a fair and impartial trial. This we are unwilling to hold.

Moreover, if appellant thought that he had been injured or prejudiced by the action of the state's counsel in inquiring as to the religious matter, then he should have pursued the matter by examination of the individual veniremen in order to determine if prejudice existed as a fact .This he did not do.

We are unable to agree with the appellant that this record reflects prejudice or discrimination against him by the jury on account of his religious affiliation.

We remain convinced that the motion for new trial was not legally sufficient to present the question of newly discovered evidence.

Believing that a correct conclusion was reached originally, the motion for rehearing is overruled.

Davidson, Judge

(Delivered October 20, 1954)
Opinion approved by the court.

Appendix D.

W. M. Olliff, Appellant

No. 27,011. v. —Appeal from Midland County,

The State of Texas, Appellee

ORDER STAYING ISSUANCE OF MANDATE

The application of the appellant for a stay of the issuance of the mandate in this cause is granted, and the Clerk of the Court of Criminal Appeals is directed to stay the issuance of the mandate and all other proceedings upon the judgment against the appellant for a period of ninety days from this date in order that he may apply to the Supreme Court of the United States for a writ of certiorari.

And the clerk is further directed that in the event the writ is granted by the Supreme Court of the United States, the issuance of the mandate be delayed until the final action by that Court upon the matter.

This the 17th day of November, 1954.

/s/ H. N. Graves
Presiding Judge,
Court of Criminal Appeals
of Texas.

A TRUE COPY:
Attest:

/s/ Glenn Haynes
Clerk, Court of Criminal Appeals of Texas

FILED IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS.
NOV 17 1954
Glenn Haynes Clerk.

Proof of Service.

I, Warren Burnett, District Attorney for the 70th Judicial District of Texas, which included Midland County, Texas, at the time of the trial of the case of the State of Texas Vs. W. M. Olliff, and which is The State of Texas Vs. W. M. Olliff, No. 27,011 in the Court of Criminal Appeals of Texas, and attorney of record for the State of Texas in said case, hereby acknowledge receipt of a copy of the foregoing Petition for a Writ of Certiorari, in the Supreme Court of the United States, to the Court of Criminal Appeals of Texas, this the——day of ————————, 1955.

———————————

Court House,
Odessa, Texas,
Ector County.

Sworn to and subscribed before me by the said Warren Burnett, this the——day of————, 1955.

———————————

Notary Public,
Ector County, Texas.

Proof of Service.

I, J. H. Mims, District Attorney for Midland County, Texas, in and for the Special District Court of Midland County, Texas, hereby acknowledge receipt of a copy of the foregoing Petition for a Writ of Certiorari in the Supreme Court of the United States to the Court of Criminal Appeals of Texas, this the—— day of————————, 1955.

————————————

Court House,
Midland, Texas,
Midland County.

Sworn to and subscribed before me by the said J. H. Mims this the——day of———————— 1955.

————————————

Notary Public,
Midland County, Texas.